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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 711

BENJAMIN F. JOHNSON

Petitioner

against

MANHATTAN RAILWAY COMPANY, *et al.*

Respondents

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY

Respondent

against

INTERBOROUGH RAPID TRANSIT COMPANY

Respondent

In the Matter

of the

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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In the Matter
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Benjamin F. Johnson, respectfully shows as follows:

I. Nature of Proceedings and Decision Below.

In the first above-entitled equity cause, hereafter referred to as the *Johnson* suit, two orders were made, one by Hon. FRANCIS G. CAFFEY, District Judge, granting petitioner leave to file the bill of complaint in said *Johnson* suit (R. 7); and the other by Hon. JOHN M. WOOLSEY, District Judge, consolidating said *Johnson* suit with the second above-entitled cause, hereafter referred to as the *Brake Shoe* case (R. 722). A further order was made by District Judge WOOLSEY in the third above-entitled cause, vacating and setting aside the orders made by Senior Circuit Judge MANTON in the *Brake Shoe* case appointing receivers of the defendants, Interborough Rapid Transit Company and Manhattan Railway Company, and the orders subsequent thereto (R. 725). (1 Fed. Supp. 809, Adv. Sheets Jan. 9, 1933.)

The United States Circuit Court of Appeals reversed all three of the above-mentioned orders. (61 Fed. [2d] 934, Advance Sheets of January 23rd, 1933.)

The case presents questions of prime importance to the public in the administration of justice in all of the district courts of the United States, and particularly in the District Court for the Southern District of New York, in that it involves the construction of Sections 18 and 23 of the Judicial Code, which have not heretofore been interpreted by the Supreme Court of the United States, and also the interpretation of two rules of the effective General Rules of the District Court for the Southern District of New York adopted June 30, 1932, designated as Rules 1-a and 11-a, which the Court below has held to be merely directory, so that the disregard and violation thereof by Judge MANTON in entertaining the *Brake Shoe* case and appointing receivers therein does not render his action *coram non judice*.

Among the grounds upon which petitioner asks for a review of the decision is, that the Court below misconstrued the meaning of Equity Rule 37, promulgated by this Court, and failed to follow the case of *United States* v. *California Canneries*, 279 U. S. 553, and the case of *Central Republic Bank & Trust Company* v. *Caldwell*, 58 Fed. (2d) 721 (C. C. A., 8th Circuit), interpreting said Rule 37, in that the Court below held that, notwithstanding that petitioner sought to impeach the decree of Judge MANTON appointing receivers of the Interborough and Manhattan companies, it was nevertheless incumbent upon petitioner to intervene for that purpose in the *Brake Shoe* case, the Court holding that said relief could not be had by means of an independent bill.

It appears in this case that a simple contract creditor, with the consent of Interborough and Manhattan, two railroad corporations, obtained the appointment of friendly receivers for both corporations, in spite of the warning by this Court against such practices in *Harkins* v. *Brundage*, 276 U. S. 36; and *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334. The Circuit Court of Appeals for the Second Circuit in *Kingsport Press* v. *Brief English Systems*, 54 Fed. (2d) 497, and again, in denying a writ of prohibition against the District Court proceeding herein (*Ex Parte Relmar Holding Co.* [61 Fed. (2d) 941], held that *Harkins* v. *Brundage* was not intended to apply to railroad corporations. We submit that this Court should determine whether the procedure followed in this case for the purpose of challenging the jurisdiction of the Court, and the appointment of receivers, was justified.

The New York bar, and the Judges of the District Court, cannot understand the repeated flouting of the effective rules governing equity receiverships in this district. Instead of clarifying the situation, the lower Court has created more doubt and uncertainty than before its decision. Moreover,

the magnitude of the financial interests at stake, involving approximately $600,000,000, and embracing the elevated and subway transportation systems of the City of New York, makes it essential, petitioner submits, that this court of last resort should pass upon the question whether the decision of District Judge WOOLSEY in declaring void the orders appointing such receivers was correct (R. 694-721).

II. Statement of Salient Facts.

On August 25, 1932, Senior Circuit Judge MANTON made an order designating and assigning himself to hold a District Court of the United States for the Southern District of New York during the period commencing August 25, 1932, and particularly, to hear and determine all applications and proceedings in the matter entitled *American Brake Shoe and Foundry Company* against *Interborough Rapid Transit Company* (R. 177). Judge MANTON predicated his right so to designate himself upon Section 18 of the Judicial Code (Section 22 of the Code of Laws of the United States) to which specific reference is made in said order. Said Section 18 reads as follows:

> "The Chief Justice of the United States or the Circuit Justice of any Judicial Circuit or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a Judicial Circuit to hold a District Court within such Circuit."

The said order of designation recited that Judge MANTON found that the public interest required such designation of himself.

After signing the above-mentioned order, Judge MANTON at the same time made another order predicated upon Section 23 of the Judicial Code. Said section reads as follows:

> "In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases for trial in said District, but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of the business and the assignment of cases for trial in said District."

In this second order, Judge MANTON after referring to his designation of himself as a District Judge, sets forth that he disagrees with the other judges of said District Court as to division of business and assignment of cases for trial in said district, and therefore directs that for a period of thirty days from the date of said order, all applications for the appointment of receivers in equity causes in said district might be made not only to the District Judge regularly designated to hear such application pursuant to Rule 11-a of the General Rules of said District Court, but also to himself (R. 178).

Rule 11-a referred to in said order was adopted on June 30, 1932, by all of the eight District Judges for the Southern District of New York, and reads as follows:

> "All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

It was found by District Judge WOOLSEY in his opinion that both of the above orders were bound together under one cover, and were filed in the Clerk's office on August 26, 1932, that is, on the day after they were made. At the same time, there were filed in said Clerk's office the bill of complaint in the *Brake Shoe* case, an affidavit entitled "Affidavit

Showing the Necessity of Individual Receivers" (R. 175), and the order of Judge MANTON made August 26, 1932, appointing receivers of the Interborough (R. 705 and 715).

It was conceded that on August 26, 1932, when said receivership order was made, Hon. ROBERT P. PATTERSON, District Judge, was the Judge duly assigned to hold the motion part of the business of said Court, and that he was in court, or in chambers, ready to receive and act upon any applications for equity receiverships, and that such application for the appointment of receivers of the Interborough was not made to him (R. 717 and 718).

It was also stated in the opinion of the Circuit Court of Appeals that Judge MANTON in appointing receivers of the Interborough had no intention of being bound by Rule 11-a above mentioned.

It further appeared that Judge WOOLSEY had polled all the District Judges and that there was no disagreement among them as to the division of business in said District or as to the validity of Rule 11-a (R. 717).

From the bill of complaint in the *Brake Shoe* case, it appeared that complainant was only a simple contract creditor, and upon consent of the Interborough, Judge MANTON appointed receivers for said company (R. 154, 168, 171, 180).

On September 6, 1932, Judge MANTON made a further order on consent of the Manhattan, extending the receivership to that company and appointing a receiver thereof (R. 196).

Thereafter numerous orders of intervention of various parties and administrative orders were made by Judge MANTON.

On September 20, 1932, Hon. FRANCIS G. CAFFEY, District Judge, made an order granting leave to petitioner to file the bill of complaint in the *Johnson* suit (R. 7), and on the fol-

lowing day, the bill was filed. *All of the parties who at that time, were parties to the Brake Shoe case, were made parties defendant in the Johnson suit.*

In said bill (R. 13), it was alleged that all of the orders of Judge Manton were void, in that he lacked power to designate himself District Judge for the purpose of hearing said *Brake Shoe* case but, if lawfully designated, had violated Rule 11-a of the General Rules of said Court in appointing receivers. Said bill further alleged that the appointment of the receivers of the Interborough and the receiver of Manhattan was improper, on account of the relationship of said receivers to said companies prior to their appointment (R. 70, 72, 74, 75, 24, 25, 26). The prayer of said bill was that all of the orders of Judge MANTON be vacated and set aside, and that independent receivers be appointed of said Interborough and Manhattan companies. Two supplemental bills were thereafter duly served and filed in the *Johnson* suit (R. 49 and 69).

Later one Lillian Boehm and other parties intervened in the *Johnson* case (R. 69 and 80).

III. Errors of the Court Below Were as Follows:

(a) The Court should have held that, upon the facts presented, it affirmatively appeared that there was no public interest which authorized Judge MANTON to designate himself a District Judge to appoint receivers in the *Brake Shoe* case, and hence that his acts as District Judge were *coram non judice*.

(b) That as there was no disagreement among the District Judges as to division of business or assignment of cases for trial, and as such alleged disagreement was the sole basis upon which Judge Manton designated himself a District Judge for the purpose of assuming jurisdiction in the

Brake Shoe case, both the order of designation and the order in which Judge MANTON permitted applications for the appointment of receivers in equity causes to be made to him, were without authority of law and were therefore void.

(c) The Court below erred in holding that Rule 11-a was merely directory, and that the violation thereof by Judge MANTON did not constitute a jurisdictional defect rendering entertainment of the *Brake Shoe* case and the appointment of receivers therein void.

(d) Another error of the Court below was that, on the assumption that Rule 11-a was only directory, the appointment of receivers by Judge MANTON in violation of said rule could be attacked only by intervention of the petitioner in the *Brake Shoe* case, and not by independent bill, wherein all the parties to the *Brake Shoe* case were made defendants.

(e) The Court below erred in not holding that the complainant in the *Brake Shoe* case, which was only a simple contract creditor, did not have the requisite status to have receivers appointed for the Interborough, in a collusive proceeding where only the Interborough, but none of its stockholders or bondholders, consented to such receivership.

To summarize: Petitioner contends that both of Judge MANTON's designations being unauthorized by the sections under which Judge MANTON purported to act, since the conditions precedent therein named were not present, there was no United States District Court forum created in which Judge MANTON had a right to act. If we are correct in said contention, it would be unnecessary to consider the validity and force of Rule 11-a or Rule 1-a of said General Rules of the Court.

If, however, Section 18 of the Judicial Code gave validity to the designation, then we are confronted with two general rules of the United States District Court, duly adopted pursuant to special statutes. We submit that said rules, even though the authority to adopt them, is predicated upon the general rule making power of the District Court, under Section 731 of Title 28 of the United States Code, have the force of a statute. These particular rules, however, were enacted, in pursuance of a specific statute, namely, Section 23 of the Judicial Code, which authorizes the District Judges, in a district having more than one Judge, to agree upon a division of business and, therefore, we submit that they are mandatory and not merely directory. Therefore, the receiverships created in defiance of Sections 18 and 23 of the Judicial Code and the flouting of the General Rules of the Court adopted in pursuance of said Section 23, rendered the orders appointing receivers ineffective and void.

There is presented herewith a certified transcript of the record in this cause in the Circuit Court of Appeals.

Wherefore, petitioner respectfully prays for the allowance of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to the end that this cause may be certified to this Court for determination by it, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

Benjamin F. Johnson,
By Alfred C. B. McNevin,
Charles Franklin,
Herbert Goldmark,
Leonard H. Goldenson,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(The opinion of the Circuit Court of Appeals, per L. HAND, C. J., is reported in 61 Fed. [2d] 934. The opinion of the District Court, per WOOLSEY, D. J., is reported in Federal Supplement, Vol. I, issued January 9, 1933, at pp. 809-820.)

POINT I.

In reaching the conclusion that Judge Manton had the power to appoint receivers in the *Brake Shoe* case the Court below erred, in that it predicated such power solely on the order of designation of August 25, 1932, whereas both orders of that day, which were physically joined, should have together been regarded as the source of such power, and, when so considered, the power to appoint receivers would have clearly been shown not to exist.

(a) The division of business order was void, and therefore the order appointing receivers was void.

On August 25, 1932, Judge MANTON made two orders, which were bound together, the first designating himself as a District Judge particularly to hear the *Brake Shoe* case, the other reciting a disagreement between himself and the other District Judges as to the division of business and therefore directing that applications for the appointment of receivers in equity causes might be made to him, as well as to the Judge regularly assigned to the motion part of the Court, notwithstanding the inhibition of Rule 11-a of the General Rules of said Court.

It is plain that without the second order, the first order would have been ineffective to accomplish the purpose which Judge MANTON had in mind in designating himself a District Judge, as we shall hereafter show, which was to appoint individual receivers of the Interborough. The first order merely made Judge MANTON a District Judge to hear the *Brake Shoe* case, but not to appoint receivers therein; before he could do that, it was necessary for him to show a disagreement between himself and the other district judges as to what judge should hear applications for receivers in

equity causes, in order to override Rule 11-a which required such applications to be made only to the Judge assigned to the motion part of the Court. Judge MANTON evidently deemed the second order necessary in order to give him the power to appoint receivers in the *Brake Shoe* case.

It follows, therefore, that the question whether there was any public interest which justified Judge MANTON's designation of himself as District Judge must be determined by a consideration of the validity of the second order, and cannot be based merely upon the validity of the first order, assuming for the moment that such first order is not subject to justifiable attack in itself.

If we examine the validity of the second order, without which the first order would have been ineffective to permit Judge MANTON to appoint receivers, we are forced to conclude that it lacked any jurisdictional foundation.

It was made pursuant to Section 23 of the Judicial Code, quoted in full above.

Judge WOOLSEY in his opinion states that he polled the eight judges of the District Court, and they all stated that there was no disagreement among them as to division of business at the time Judge MANTON's orders of August 25, 1932, or the orders appointing receivers, were made.

The only case interpreting Section 23 is *Case* v. *United States*, 14 Fed. (2d) 510 (C. C. A., 8th Circuit). In that case the two District Judges for the Eastern District of Oklahoma actually disagreed as to the division of business in said District, and of their own accord, submitted such disagreement to the Senior Circuit Judge of said Circuit, Judge SANBORN, who, thereupon, divided the business of the district between said judges.

Section 23 cannot be interpreted to mean, as it would have to be, to sustain the order of Judge MANTON, that a Senior Circuit Judge can designate himself a District Judge

for the sole purpose of acting upon a disagreement which is brought into being between himself, as such District Judge, and the appointed District Judges, consequent upon such designation. Section 23 contemplates that the Senior Circuit Judge should act as a peacemaker and compose the differences then existing between the appointed District Judges, and not that he himself should create such dissension.

The second order of Judge MANTON thus being void, as being in excess of any authority, he was without right to appoint receivers in violation of Rule 11-a of the General Rules of the District Court.

(b) Considering the order of designation alone, it affirmatively appeared that there was no public interest which required such designation and, therefore, Judge Manton never became a District Judge.

As we have observed, Section 18 of the Judicial Code permits a Senior Circuit Judge, "if the public interest requires" to designate and assign any Circuit Judge of a Judicial Circuit to hold a District Court within such Circuit.

In Judge MANTON'S first order he recites that the public interest requires that he be assigned to hold a District Court.

The Circuit Court of Appeals held that this recital was conclusive upon the Court that the public interest did require such designation. In reaching this conclusion we submit that the Court below was in error. For instance, in *State* v. *Kane*, 173 La. 35 (June, 1931), a statute conferred upon the district judge power to fix sessions of the court in a judicial district composed of more than one parish, and provided that, after fixing the date of such sessions no change in such date could be made within one year thereafter. The statute also provided that the fixing of such sessions should not affect the authority of the judge to hold

a session at any time in any parish in his district "whenever the public interest may require it". The judge designated by the district judge to hold such session changed the date of the beginning of such session from the third Monday of May to the first Monday of May, although the third Monday of May had been fixed by said district judge within less than a year from such change. In order to sustain such change, on the ground that the public interest required it, the judge making the same had to state the facts upon which he based his action and, as such facts were found sufficient to justify the change, it was held that a verdict in a criminal case rendered at a term of the court convened on said earlier date was valid.

Applying the principle of the above case that the evidence to sustain a finding of public interest can be considered, it appears that the order of designation of Judge MANTON was based upon a specific affidavit of one Quackenbush, the attorney for the Interborough, entitled "Affidavit Showing the Necessity of Individual Receivers" in which were set forth the reasons why in his opinion it was in the public interest that no receiver in the *Brake Shoe* case should be a trust company or any other corporation, but that the receiver or receivers should be an individual or individuals. Subsequent to the decision of Judge WOOLSEY, and before the decision of the Circuit Court of Appeals, Judge MANTON rendered an opinion, which is reported in 1 Fed. Supp. 820, (Advance Sheets for January 9, 1933), in which said Justice specifically refers to the above affidavit of James L. Quackenbush as the basis for his finding that the public interest required him to make the orders of August 25, 1932, and the order appointing receivers.

This affidavit of Quackenbush, and opinion of Judge MANTON, are referred to by the Court below, but, notwithstanding the contention of petitioner that the interest dis-

closed therein was not the kind of interest contemplated by the statute, the Court disregarded this point by stating that even so, the order conferred the statutory authority upon the designated judge. We contend that this conclusion is a complete *non sequitur.*

Petitioner maintains that, where it affirmatively appears that no public interest required Judge MANTON to designate himself, then the order designating himself was without statutory authority, and void, as he had never become a District Judge.

The Court below cited *People* v. *Supreme Court,* 220 N. Y. 487, upon the proposition that the Court could not inquire into the question whether the public interest required such designation, but that Judge MANTON'S recital to that effect was conclusive. In that case, however, the record was silent as to what public interest required the Governor to appoint an extraordinary term of court. Besides in that case the Court was asked to nullify an act of a coordinate branch of the Government, whereas here, the Court was requested to invalidate the act of a judge of one court who designated himself as judge of another court for the sole purpose of flouting its rules upon the suggestion of public interest.

Certainly the words "public interest" do not mean that the Senior Circuit Judge can make a designation for the purpose of controlling or dominating the business of the Court arbitrarily or whimsically, or because of any personal views which he may have—differing from the views of the District Judges—as to the handling of cases, or as to the wisdom of rules validly adopted. We contend that the broadest and most liberal interpretation would not include the right of a Senior Circuit Judge to name himself as a District Judge whenever he chose to disagree with the lower Court, or because he did not approve of a rule which

they adopted under proper statutory authority; surely there is no basis for such unlimited power; the very breath of the section is its danger; it calls for a reasonable construction.

In the case at bar the record is not silent as to what "public interest" motivated Judge MANTON in designating himself a District Judge, but it explicitly shows that such alleged public interest was the unjustified fear that individual receivers would not be appointed, since there was no court rule requiring the appointment of a corporate receiver in equity causes.

We have, therefore, the right to inquire whether such necessity created a public interest within the meaning of Section 18 of the Judicial Code, for it has been held that, when the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

> *Galpin* v. *Page*, 18 Wall. 350;
> *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, 17 (following *Galpin* v. *Page*, *supra*).

Moreover, the claimed necessity for appointment of individual receivers does not create a "public interest" within the meaning of the above section.

In *Pennsylvania Steel Co.* v. *N. Y. City Ry. Co.*, 221 Fed. 440, Judge LACOMBE analyzed the meaning of Section 18 of the Judicial Code in the light of the circumstances surrounding its passage, and reached the conclusion that the only two instances of a public interest which justified a Senior Circuit Judge to invoke said section were a congestion of business in the district court or business left unfinished by a Circuit Judge prior to the abolition of the Circuit Courts.

We submit that the question whether an individual receiver, rather than a corporate receiver, should be appointed

in a particular case affects chiefly the private interests of the particular defendant and its creditors and is only remotely a matter of public concern. If the construction contended for by the Court below is sound, then no matter on what pretext a Senior Circuit Judge designated himself a District Judge, such action could not be attacked, provided only such Senior Circuit Judge recited in the order designating himself that the public interest required such designation and, notwithstanding the assumption of such jurisdiction, as here, was for the sole purpose of overriding the rules of the District Court to which he thus appointed himself.

Such an interpretation would make a Senior Circuit Judge an autocrat who could arbitrarily take away the power of a duly appointed District Judge, if for any reason sufficient to such Senior Circuit Judge he declared that public interest required such action. Such judge would under such a view have more power than the President of the United States to whom is committed the appointment of District Judges, for, if such Senior Circuit Judge could thus appoint himself a District Judge for a particular case, he could under the language of said section designate another Circuit Judge for the same purpose and any Circuit Judge could likewise designate himself for that purpose, so that it would be possible for the Circuit Judges to completely usurp the powers of the District Court, if they in their uncontrolled discretion deemed it advisable to do so. The interpretation given to said section by the Court below thus leads to a *reductio ad absurdum.*

However the question would have been decided if the record had been silent as to the nature of the alleged public interest, here the record is not silent on this point, and when we consider the reason given for the designation of Judge MANTON of himself as District Judge, as we have the

right to do under the above authorities, we find that there was no public interest, as distinguished from a private interest, within the meaning of Section 18, which justified such designation, and, therefore, such appointment was without statutory authority and void.

(c) No application having been made to the Judge assigned to the motion part of the Court to appoint receivers, there was no evidence that a corporate receiver might be appointed and hence, no public interest shown justifying a violation of Rule 11-a.

We have shown by the authorities above cited, that where it affirmatively appears that no public interest required Judge MANTON to assume the power of appointing receivers, such appointment lacked a jurisdictional basis. Assuming even that the public interest required the appointment of individual receivers instead of a corporate receiver, it plainly appears from Judge WOOLSEY's opinion, and the bill of complaint, that no request was made of Judge PATTERSON, who was assigned to the motion part of the Court to appoint receivers, and hence it cannot be said that he would have appointed a corporate receiver, there being no rule of the District Court which called for the appointment of a corporate receiver in equity causes. Without a showing that Judge PATTERSON intended to appoint a corporate receiver, there was no public interest, even on the theory of counsel for the Interborough, which required Judge MANTON to act.

POINT II.

Rule 11-a was not merely a directory rule and hence a violation thereof rendered the appointment of receivers *coram non judice*.

Rule 11-a was passed in pursuance of Section 23 of the Judicial Code, above cited, which permits district judges, in districts having more than one judge, to agree upon a division of business. They did so agree by virtue of Rule 11-a.

It has been held that even a rule of a District Court as to mere procedure has the force of a statute.

Weil v. *Neary*, 278 U. S. 160.

Here Rule 11-a having been made in pursuance of a specific statute, and not merely in pursuance of the general rule-making power conferred on the District Courts by Section 731, Title 28 of the United States Code, itself had the force of a statute, and its violation rendered Judge MANTON'S order void.

Case v. *United States*, 14 Fed. (2d) 510 (*supra*).

In that case after Judge SANBORN divided the Eastern District of Oklahoma into two divisions, a trial presided over by a Judge in a different district than the one to which he had been assigned by Judge SANBORN, nullified the entire proceeding.

POINT III.

The Court below erred in holding that petitioner could attack Judge Manton's orders only by intervention in the *Brake Shoe* case.

The Court below admitted that, if Rule 11-a deprived Judge MANTON of jurisdiction to proceed under the order designating him to hold the District Court, the petitioner could maintain an independent bill to attack Judge MANTON'S orders. The Court, however, held that such rules were merely directory and did not therefore deprive Judge MANTON of jurisdiction. For that reason the Court held that the attack upon Judge MANTON'S orders should have been made by intervention in the *Brake Shoe* case.

As the object of such intervention, however, was to impeach Judge MANTON'S decrees in entertaining the *Brake Shoe* bill, and also appointing receivers, such result could not be accomplished by intervention.

Rule 37, Equity Rules of Supreme Court of United States;

U. S. v. *California Canneries*, 279 U. S. 553, and cases cited;

Central Republic Bank & Trust Co. v. *Caldwell*, 58 Fed. (2d) 721 (C. C. A., 8th Circuit).

It has been specifically held that the better practice in attacking a decree to which the party making such attack is a stranger, is by an independent bill.

Compton v. *Jesup*, 68 Fed. 263 (C. C. A., 6th);

Morgan's Co. v. *Texas Central Ry.*, 137 U. S. 171, at page 201;

Hopkins v. *Lancaster*, 254 Fed. 190, 193 (cited with approval in *U. S.* v. *California Canneries, supra*);

State Trust Co. v. *Kansas City P. & G. R. Co.*, 120 Fed. 398, 407 (cited with approval in *U. S.* v. *California Canneries, supra*).

POINT IV.

The *Johnson* suit having been promptly filed, petitioner was in a position to attack the consent decree in the *Brake Shoe* case based upon a bill of a simple contract creditor.

In *Harkins* v. *Brundage*, 276 U. S. 36, the practice of obtaining a friendly receivership by consent upon a bill of a simple contract creditor, was disapproved. In the case at bar, the complainant in the *Brake Shoe* case was a simple contract creditor and the receivership was a "friendly" one obtained by consent of the Interborough. That it was friendly appears from the fact that the solicitors appointed for the receivers of the Interborough had represented said Interborough and its affiliated company as counsel within less than a year prior to the receivership and that one of the receivers of said Interborough was a member of said firm of solicitors at the time of his appointment.

See also:

Michigan v. *Michigan Trust Co.*, 286 U. S. 334.

Coupled with the fact that the consent decree was made at the instance of a simple contract creditor, among other reasons set forth in the main and supplemental bills, petitioner contends that the close relationship of the solicitors of the receivers to the Interborough, is sufficient to show

that the entire proceeding was a collusive one, the orders in which were properly set aside by Judge WOOLSEY (R. 70, 72, 74, 75, 24, 25, 26).

CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated, New York, January 15, 1933.

Respectfully submitted,

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Counsel for Petitioner.

CHARLES FRANKLIN,
HERBERT GOLDMARK,
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Of Counsel.

FILE COPY

No. 721

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM—1932.

BENJAMIN F. JOHNSON,

Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al*,

Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,

Respondent.

IN THE MATTER

of the

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

PETITION AND

BRIEF OF INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION OF BENJAMIN F. JOHNSON FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ELLIOT S. BENEDICT,
BOEHM & ZEIGER,
Counsel for Intervenor,
Lillian Boehm,
30 Broad Street,
New York City.

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No.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1932

BENJAMIN F. JOHNSON,
Petitioner,
against
MANHATTAN RAILWAY COMPANY, *et al*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN
RECEIVERSHIP PROCEEDINGS.

BRIEF OF INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION OF BENJAMIN F. JOHNSON FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Intervenor's Status.

The intervenor, Lillian Boehm, duly intervened as party plaintiff in the suit of Benjamin F. Johnson, first above entitled, in which the plaintiff now petitions this Court for a writ of certiorari (p. 137). The intervenor adopts his petition and joins in his prayer.

Summary of the Facts.

On June 30th, 1932, Rules 1a and 11a of the General Rules of the District Court for the Southern District of New York were adopted by all of the eight judges of the District. They provide:

> "1a. Any Judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge."
>
> "11a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (* * *) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the Court, *and to no other judge.*" (p. 702). (Our italics.)

They were adopted pursuant to Sections 731 and 27, Title 28, U. S. Code.

Section 731 grants the district courts statutory power to enact rules to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 27 empowers the district courts to provide for the division of their business. It reads:

> "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; *but in case they do not so agree*, the senior circuit judge of the circuit in which the district lies, shall make all *necessary* orders for the division of business and the assignment of cases for trial in said district." (Our italics.)

On August 25th and 26th, 1932, Judge Patterson, who had been duly assigned to hold the Motion Part pursuant to agreement of the District Judges, was sitting in Court or in Chambers functioning as Judge of the Motion

Part, ready to deal with any applications for equity receiverships (pp. 717, 718).

On August 25th, 1932, counsel for Interborough Rapid Transit Company, and its creditor, American Brake Shoe & Foundry Company, attended before Judge Manton, Senior Circuit Judge, in his Chambers, and requested him to designate himself to hold a District Court so that he could entertain an application for the appointment of receivers in a creditor's action, about to be brought. They presented an affidavit of Interborough's counsel, entitled in that action, stating as the ground for this unusual request his fear that Judge Patterson might appoint a trust company, rather than an individual, as receiver (p. 175. See also *American Brake Shoe & F. Co.* v. *Interborough R. T. Co.,* 1 Supp. Fed. 820, Manton, J.).

Thereupon, on the same day, Judge Manton signed two orders. The first order recited that the public interest required that he be designated and assigned as Circuit Judge to hold the District Court within such Circuit beginning on that day, and ordered his designation and assignment as such, particularly to hear all applications in the Brake Shoe suit not then commenced (p. 177). The order recited as its authority Section 22, U. S. Code, which provides:

> "The Chief Justice of the United States or the Circuit Justice of any judicial district, or the Senior Circuit Justice thereof, may, *if the public interest requires*, designate or assign any circuit judge of a judicial circuit to hold a District Court within such circuit." (Our italics.)

The second order declared that as a Circuit Judge designated to hold a District Court, he did not agree with the other Judges of the said District Court as to the existing division of business therein, and as Senior Circuit Judge ordered that for a period of the next

thirty days all applications for the appointment of receivers in equity causes in that district might be made not only to the District Judge designated to hear all such applications pursuant to Rule 11a, but also to himself (p. 178).

These two orders, bound together under one cover, and in reality constituting but one order, were filed on the following day, August 26th, 1932, in the Clerk's Office (p. 715).

On the same day, August 26th, the American Brake Shoe & Foundry Co. filed a creditor's bill upon a simple contract claim for $27,000 against the Interborough, praying for an equity receivership (pp. 153, 170). At that time Interborough had almost $5,000,000 in bank and was well able to pay this claim (fols. 222, 224, 232). On the same day Judge Manton, upon this bill, and Interborough's consent, signed an order appointing receivers of the Interborough (pp. 180, 184, 705, 715).

No application was made to Judge Patterson on either August 25th or 26th, though he was the duly assigned judge sitting in the Motion Part, and was actively functioning as such on both days. No request was made by Judge Manton as District Judge to Judge Knox as Senior District Judge, under Rule 1a, for an assignment of the Court's business, or for an assignment specifically to hear the Brake Shoe receivership application (pp. 717-718).

A poll of all the District Judges disclosed that there was no disagreement among them as to the division of business (p. 717).

Subsequently, Judge Manton extended the receivership to the Manhattan Railway, upon its application and consent (p. 196).

On September 21st, 1932, the petitioner, Johnson, a Manhattan stockholder, filed his bill of complaint in a representative stockholders' action joining as defendants all the parties in the Brake Shoe case, alleging, among

other things, that the orders of Judge Manton, particularly the order of designation, order of division of business, and order appointing receivers, were wholly void and beyond his jurisdiction, since he lacked power to designate himself District Judge to hear the Brake Shoe case and to order the division of business and had violated Rules 1a and 11a in appointing receivers. The bill prayed that these and all subsequent orders of Judge Manton in the Brake Shoe case be vacated and set aside, and that independent receivers of Interborough and Manhattan be appointed (pp. 13, 49, 69).

On September 21st, 1932, Lillian Boehm, a secured creditor of Interborough, and stockholder and bondholder of Manhattan, by leave granted, intervened as party plaintiff in the Johnson suit (pp. 137, 80).

On October 18th, 1932, Judge Woolsey, on motion of Johnson and Boehm, vacated Judge Manton's orders appointing receivers upon the ground that Judge Manton's acts in the District Court were *coram non judice* (pp. 725, 694-721, *Johnson* v. *Manhattan Ry. Co., et al,* 1 Fed. Supp. 809).

On appeal to the Circuit Court of Appeals, Judge Woolsey's order was reversed (*Johnson* v. *Manhattan Ry. Co.*, 61 Fed. (2d) 934). Review of this determination is now sought.

Importance of the Case.

This case involves questions of Federal law of prime importance to the public in the administration of justice not only in the District Court, Southern District of New York, but in all the district courts throughout the country. As Judge Woolsey said in his opinion, it "raises important questions of Federal Court administration of first impression" (p. 699). The uncertain state of the law, and the need for definite and authoritative judicial settlement is implicit in Judge Hand's opinion on appeal.

Sections 22 and 27 of the U. S. Code have not yet been construed by this Court. Whether Rules 1a and 11a of the District Court (which Judge Manton violated) are mandatory, rendering his acts in violation thereof void for lack of jurisdiction and power, or are merely directory, calls for final judicial review.

The independence of the District Court in matters of original jurisdiction is at stake. Whether a senior circuit judge, for the purpose of having certain judicial business of the District Court conducted according to his personal views, may inject himself into the district court as a district judge, regardless of public interest or necessity, and then under pretext of dissension among the district judges which he himself creates, assign to himself this specific judicial business, in defiance of the district court's own rules for the conduct and division of its business, presents a problem far-reaching in its scope.

Involved in this case are the rights of the stockholders and bondholders of Interborough and Manhattan, representing a capitalization and investment of over three hundred million dollars and embracing the elevated and subway transportation systems of the City of New York, the rights of the City to whom Interborough is indebted for almost two hundred million dollars, the interests of the vast traveling public, as well as the rights of all persons dealing with the Interborough and Manhattan receivers, the validity of whose acts is in doubt because of their questioned jurisdictional foundation.

Because of the vital questions involved herein, this case has since its inception drawn the sustained interest and attention of the Bar and the public press, and has been extensively editorialized both in the daily prints and in legal publications.

The unusual and circuitous procedure here adopted for the appointment of receivers has tended to cast doubt and reflection in the public mind upon the administra-

tion of justice in the federal courts. The decision of the Court below has not dispelled it. This departure from the usual and accepted course of judicial proceedings in the appointment of equity receivers calls for the exercise of this Court's power of supervision.

Specifications of Error.

The Court below erred in the following respects:

1. The Court held that Judge Manton had power to designate himself to hold a District Court whereas, inasmuch as it affirmatively appeared that the public interest did not require such designation, it should have determined that he was without such power, and that his consequent acts as designated District Judge were *coram non judice.*

2. The Court should have held that Section 18 of the Judicial Code did not empower Judge Manton to designate the case which he was to hear, or the part in which he was to sit, inasmuch as it does not provide for any selective designation or any focusing of judicial activity in the District Court.

3. The Court should have held that inasmuch as there was no disagreement among the District Judges as to the division of business, Judge Manton, as Senior Circuit Judge, had no power to make an order for the division of business assigning himself as District Judge to hear applications for the appointment of receivers, and, consequently, his order for the division of business and his orders appointing receivers were without authority in law and void.

4. The Court erred in holding that Rules 1a and 11a were not mandatory but merely directory, and that

Judge Manton's violation of these rules in attempting to take jurisdiction of the Brake Shoe case was not a jurisdictional defect, but only reversible error.

5. The Court erred in holding that Judge Manton's jurisdiction to act in the Brake Shoe case and to appoint receivers in violation of Rules 1a and 11a, could be attacked only by the petitioner's intervention in the Brake Shoe case, and not by independent bill.

POINT I.

Judge Manton had no power to designate himself to hold a District Court inasmuch as it affirmatively appears that there was no public interest which required such designation. His acts as such designated judge were accordingly coram non judice.

The statute expressly provides that the Senior Circuit Judge may designate a circuit judge to hold a district court *if the public interest requires* (Section 18, Judicial Code). Unless there is public interest in fact, a designation would be an arbitrary and capricious act. The mere recital cannot be conclusive when challenged. There must be some basis in fact to support it.

Originally this section provided for designations if *in the judgment* of the designating judge, the public interest required such designation, as Sections 13, 16 and 17, Judicial Code, still do. Section 18, however, was amended to its present form on September 14th, 1922, by the omission of the words "whenever in the judgment of the senior circuit judge." Thus the designation under Section 18 became dependent upon the existence in fact of a public interest.

Unless the public interest in fact required Judge Manton to designate himself to hold a District Court, his designation order was without power and void.

By Judge Manton's opinion in the form of instructions to the acting receivers, rendered after Judge Woolsey's decision, but before the appeal, it clearly appears that the public interest he expressed in his order of designation was based solely upon the fear that Judge Patterson, the judge duly assigned to, and holding the Motion Part, might appoint a trust company as receiver rather than individual receivers (*Amer. Brake Shoe & F. Co.* v. *Interborough R. T. Co.*, 1 Fed. Supp. 820).

This fear was utterly unfounded, for, as Judge Manton himself stated, he did not inquire of Judge Patterson before making the orders of designation whether he would appoint an individual, or trust company, as receiver. Furthermore, there is no District Court rule requiring the appointment of a trust company as receiver in equity cases. The rule requiring trust company appointment is solely a bankruptcy rule. This is not the kind of public interest contemplated by the statute as the requisite for designation. It is a private interest; the public is but remotely concerned.

If this be public interest, then a senior circuit judge doubting the ability, experience, discretion, or wisdom of any district judge to conduct a particular cause, or differing with the district judges in his views concerning the transaction of judicial business of the District Court, might designate himself as district judge, step in and take unto himself the particular cause or business, and dispose of it as he believes the district judge duly assigned thereto ought to. To so hold, would lead inevitably to judicial confusion and chaos. It would destroy the independence of the district courts.

Section 18 of the Judicial Code, providing for designation of a circuit judge, was enacted in connection with the abolition of the Circuit Court, and the transfer of its business to the District Court. Its purpose was to permit Circuit Judges to complete unfinished business rather than require the District Judges to take up unfinished

work *de novo,* and to assist the District Judges when overburdened with a congestion of business. The public interest contemplated is clearly evidenced by the purpose of the statute.

> *Pennsylvania Steel Co.* v. *New York City R. R.,* 221 Fed. 440 (Lacombe, J.).

The Court below erred in holding the recital of public interest conclusive. In *State* v. *Kane,* 173 La. 35 (1931), where the statute empowered the judge to fix sessions of the court, and provided that after such fixing no change could be made within a year thereafter, but that the fixing of such sessions should not affect the judge's authority to hold sessions at any other time whenever public interest required, a judgment rendered at a changed session was held valid only after a finding of sufficiency of the facts upon which the judge concluded that public interest required the change in session.

If the mere statement of public interest is conclusive in the order of designation, notwithstanding that the factual basis expressed clearly negatives the existence of any public interest, then a senior circuit judge could designate himself a district judge at any time for the purpose of autocratically meddling and interfering with the administration of the District Court, under the mere pretext of "public interest," wholly unfounded.

POINT II.

Judge Manton under Section 18, Judicial Code, had no power to designate the case which he was to hear or the part of the court in which he was to sit.

Section 18, Judicial Code, does not provide for any selective designation or any focusing of judicial activity in the District Court. Upon designation, a Circuit Judge

does not acquire any greater powers than the duly appointed District Judges. He cannot roam at will in the District Court choosing such judicial business as his whim or fancy may dictate. He must conform to the rules of that court, and transact the business assigned to him in accordance with its rules, like any other district judge.

POINT III.

Since there was no disagreement between the district judges with respect to the division of business in the District Court, Judge Manton as senior circuit judge had no power to order that applications for the appointment of receivers might be presented to him as district judge.

Judge Manton, having designated himself to sit as a District Judge, and desirous of hearing the Brake Shoe application for receivership, found Rule 11a an obstacle in his path.

Section 27, U. S. Code provides that *if the District Judges do not agree* upon the division of business, the Senior Circuit Judge shall make all *necessary* orders for the division of business in said district. Judge Woolsey's poll of the eight judges disclosed that there was in fact no disagreement among them. This prerequisite being absent, Judge Manton, as Senior Circuit Judge, had no power to make an order for division of business. None was necessary.

To circumvent Rule 11a, Judge Manton, sitting as District Judge, thereupon declared that he disagreed with the other District Judges as to who should hear applications for receivers in equity causes. Under the guise of such disagreement, he as Senior Circuit Judge, then made his order dividing the business of the District Court, and ordering applications for the appointment

of receivers to be made before him, as well as to the judge duly assigned to sit in the Motion Part.

This order was without jurisdictional foundation. The role assigned to the Senior Circuit Judge under Section 27 was that of peacemaker to compose existing differences among the District Judges, not the role of troublemaker to inject dissension into District Court harmony. Neither Sections 18 nor 27 contemplate a designation for the purpose of creating disagreement with the District Judges, when in fact harmony exists, so that the Senior Circuit Judge by such self-created dissension may arrogate to himself and control the District Court's business.

Furthermore Judge Manton's designation did not make him a District Judge, but only gave him authority as Circuit Judge to hold a District Court.

Craig v. *Hecht*, 263 U. S. 255, 274.

He therefore had no such status in the District Court as to give him the right to participate (and disagree) in the division of business or rule-making of the District Court.

POINT IV.

Rules 1a and 11a having the force of statute are mandatory and not directory. Judge Manton's acts in the Brake Shoe Case in direct violation of these rules were jurisdictionally defective. He was without power to hear the application.

Rules 1a and 11a have the force of law and the juridical status of statute.

Rio Grande Irrigation Co. v. *Gildersleeve*, 174 U. S. 603, 608;
Weil v. *Neary*, 278 U. S. 160.

These Rules are mandatory. Rule 11a provides that applications for the appointment of receivers shall be made to the judge assigned to the Motion Part "*and to no other judge.*" The Rule goes to jurisdiction. A judge not assigned to the Motion Part has no authority to hear such applications. The test of jurisdiction is the power to hear and determine. It is the right to decide.

United States v. *Arredondo*, 6 Pet. 691;
Phebus v. *Search*, 264 Fed. 407 (C. C. A. 8th).

Judge Manton was not assigned to the Motion Part, and was therefore without power to hear and determine the application for receivers in the Brake Shoe case. Without such jurisdiction his acts were null and void.

Proceedings of a judge at a time or place other than that prescribed or authorized by law, are *coram non judice*, and void.

Case v. *United States*, 14 Fed. (2d) 510;
McGlashan v. *United States*, 71 Fed. 434 (C. C. A. 7th);
In re Steele, 161 Fed. 886.

In *Case* v. *United States*, 14 Fed. (2d) 510, the two District Judges appointed to one District disagreed upon the division of work. The Senior Circuit Judge thereupon divided the District into two divisions and assigned one Judge to each division. The trial by one judge of a person indicted for offenses committed in the other division was held not a mere irregularity, but wholly without authority and void.

It is well established that an act by a judge in violation of a mandatory rule of court is void.

In re Rogers Pyatt Shellac Co., 43 Fed. (2d) 863 (S. D. N. Y.) affd. 51 Fed. (2nd) 988;
Boyer v. *Boyer*, 129 App. Div. 647 (N. Y.).

Judge Manton had no power to ignore or dispense with Rule 11a. It could be modified, waived, or dispensed with only by those who adopted it, the eight judges of the District Court.

Halter v. *Wade*, 85 Colo. 121, 124;
Carp v. *Kaplan*, 251 Mass. 225, 228.

POINT V.

Judge Manton in hearing the application in the Brake Shoe Case, was neither a de jure nor a de facto judge. There cannot be a de facto judge acting in the court in which a de jure judge is present and functioning.

Judge Patterson was the *de jure* judge regularly assigned and sitting in the Motion Part of the District Court to hear applications for the appointment of receivers at the time the application in the Brake Shoe case was made to Judge Manton.

Judge Manton's orders appointing receivers could not therefore be validated on the theory that if he was not a Judge *de jure*, he was at least a Judge *de facto*, for it is well settled that there cannot be a *de facto* judge when there is a *de jure* judge in actual performance of the duties of the office.

33 Corpus Juris, 925;
People v. *Brautigan*, 310 Ill. 472, 479;
Commonwealth v. *Bush*, 131 Ky. 384, 393;
United States v. *Alexander*, 46 Fed. 728.

POINT VI.

The Court below erred in holding that Judge Manton's jurisdiction to act in the Brake Shoe case and power to appoint receivers could be attacked only by intervention in the Brake Shoe case and not by independent bill.

An intervention must be subordinate to, and in recognition of, the propriety of the main proceeding.

> *Rule 37,* Rules of Equity Practice;
> *United States* v. *California Canneries,* 279 U. S. 553.

An intervenor cannot seek the aid of the court, and at the same time attack its jurisdiction in the cause in view of Rule 37.

> *Union Trust Co.* v. *Jones,* 16 Fed. (2nd) 236 (C. C. A.).

Intervention to challenge jurisdiction or to inaugurate litigation outside the scope of the original suit is not permissible.

> *Board of Drainage Comm.'s* v. *Lafayette S. Bank,* 27 Fed. (2nd) 286 (C. C. A.).

The Johnson and Lillian Boehm bills whose prayer was to vacate Judge Manton's receivership orders, constituted a direct attack upon his jurisdiction and power by the only method available to them, that of independent bill. They were not parties to the Brake Shoe case, and had no opportunity to make proper objection to Judge Manton's jurisdiction prior to the making of the orders. The method of appointment of receivers in the

Brake Shoe case foreclosed Johnson and others similarly situated, from recourse in that proceeding to deny or attack Judge Manton's power. Leave to intervene could only be obtained at the price of recognition of his authority, thus defeating at the outset the very purpose of the intervention.

Where a stranger to the cause seeks to impeach the jurisdiction, the remedy afforded him is by original bill.

> *Hopkins* v. *Lancaster,* 254 Fed. 190, 193;
> *State Trust Co.* v. *Kansas City P. & G. R. Co.,* 120 Fed. 398, 407.
> (Both cases cited with approval in *United States* v. *California Canneries,* 279 U. S. 553.)

The Court below impliedly admitted that Judge Manton had violated the rules of the District Court, and that if Rule 11a were mandatory and deprived him of jurisdiction, the jurisdictional attack could be made by independent bill. It held, however, that the Rule was only directory and did not go to jurisdiction, and that the attack therefore should have been by intervention in the Brake Shoe case before Judge Manton himself.

In this the Court below erred. Since the object of Johnson and Lillian Boehm was to impeach Judge Manton's orders in the Brake Shoe case by challenge of his jurisdiction, it could not be accomplished by intervention.

The Court below further held in error that the complainants might have appeared before Judge Manton on the return day of the order to show cause for the continuance of the receivership in the Brake Shoe case, and there urged their objection to his jurisdiction. The complainants, however, were not parties to the Brake Shoe case, and had no notice of the application. If they intervened, they could not attack the jurisdiction in that cause. If they attempted without intervening to urge their objection, upon its denial by Judge Manton (a

result readily to be presumed), they would be left without right of appeal or other recourse, since they were not parties and had acquired no standing in the action.

POINT VII.

The petition of Benjamin F. Johnson for a writ of certiorari should be granted.

Dated, New York, February 11th, 1933.

Respectfully submitted,

BOEHM & ZEIGER,
Counsel for Intervenor,
Lillian Boehm.